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No. 73-357

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In the Supreme Court of the United States

OCTOBER TERM, 1973

2,431.4 ACRES OF LAND, MORE OR LESS, SITUATED IN HANCOCK COUNTY, MISSISSIPPI, AND CLAY CALHOUN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This condemnation proceeding was instituted by the United States in 1963 to acquire a perpetual easement upon petitioners' land prohibiting human habitation on the land because of a nearby rocket testing facility. The case was first submitted to a jury, which returned a verdict of $175,000 as just compensation. On petitioners' appeal the order confirming the verdict was reversed and the case was remanded for a new trial. *Calhoun* v. *United States,* 384 F. 2d 180 (C.A. 5). On remand, the case was submitted to a commission pursuant to Rule 71A(h), Fed. R. Civ. P., which returned an award of $195,620. The district court set aside that award and remanded the case to the commission for a new hearing, after which the commission awarded $253,620 as just compensation and subsequently amended

the award to $264,690. The latter award was approved by the district court, and the judgment was affirmed by the court of appeals. 473 F. 2d 1389.

Petitioners' basic contentions are that they were denied a jury trial on remand and that the compensation awarded them is inadequate. Neither contention presents an issue warranting review by this Court. As this Court stated in *United States* v. *Reynolds,* 397 U.S. 14, 18, "* * * it has long been settled that there is no constitutional right to a jury in eminent domain proceedings." Pursuant to Rule 71A(h), Fed. R. Civ. P., "the court in its discretion" submitted the issue of just compensation to a commission. The petitioners cite no specific abuse of discretion on the part of the district court in referring the issue of just compensation to a commission, and the record below, which covers a period of nearly 10 years, reveals none.

Petitioners also complain of the refusal of the district court to award them the costs of litigation. However, costs are not assessable against the United States in the absence of specific statutory authority (*Dohany* v. *Rogers,* 281 U.S. 362), and several courts of appeals have concluded that the limited costs allowed by 28 U.S.C. 2412 are not allowable in condemnation cases. *United States* v. *2,186.63 Acres of Land, Wasatch Cty., Utah,* 464 F. 2d 676 (C.A. 10); *United States ex rel. T.V.A.* v. *Easement & Right-of-Way,* 452 F. 2d 729 (C.A. 6). Moreover, this issue was not included as one of the assignments of error, briefed or argued in the court of appeals and was not decided by that court. It is therefore not properly presented here. *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 330; *California* v. *Taylor,* 353 U.S. 553, 556-557 n. 2; *McCullough* v. *Kammerer Corp.,* 323 U.S. 327, 328.

Petitioners' contentions with respect to the adequacy of the award (Pet. 8-9) are directed to the weight of evidence and credibility of witnesses and not to any principle of law. These matters have been resolved by the triers of fact after three separate trials and do not warrant further review.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

[001-1973-10]